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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 84

FRANK MASCIALE,

Petitioner,

vs.

UNITED STATES OF AMERICA.

REPLY BRIEF FOR PETITIONER

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Summary of Argument

The Government's brief makes two principal arguments:

(1) there was a conflict of evidence properly submitted to the jury to resolve, and

(2) it was unnecessary for the Government to show that petitioner had previously dealt in narcotics.

The second argument, we believe, is met squarely in our main brief and in Judge Frank's dissenting opinion below (R. 117) and needs no further discussion. The first, however, requires comment because it takes a view of the record that might otherwise be misleading to the Court.

ARGUMENT

There Was Not a Conflict of Proof but a Complete Failure of Proof on the Critical Issue of Petitioner's Willingness to Commit the Offense Charged.

The Government claims to find a "conflict" in the evidence on the issue of petitioner's willingness to commit the offense charged. The "conflict" is defined at pages 11 and 12 of the Government's brief, as follows:

> "On the one hand, there was testimony by the government, confirmed by some of petitioner's own testimony, that he was independently interested in engaging in the narcotics trade before Marshall, the government agent, posed as a buyer; and that petitioner showed himself eager to accomplish a sale when the buyer appeared. * * * On the other hand, there was petitioner's version that he had no thought of dealing in narcotics until Kowel put the idea in his mind."

We submit that this constitutes no conflict in the testimony whatsoever. The statements are entirely consistent because each refers to a separate incident in the course of events.

We conceded in our main brief that the jury might have found that petitioner was willing to engage in the transaction at the time of this meeting with Marshall and that the jury might have disregarded petitioner's testimony that he merely intended to "string him along" (Pet. Br. p. 13). However, petitioner's willingness at the time of the meeting with Marshall was in no way inconsistent with or in conflict with his uncontradicted reluctance to participate at the time he was first approached by Kowel.

It will be remembered that petitioner testified, entirely without contradiction, that Kowel, Marshall's special employee, had been urging petitioner over his protests for a period of several weeks to meet with Marshall (R. 52-68). Of course, as we have conceded, the jury could have disbelieved this testimony and disregarded it (Pet. Br. p. 13). But there was no other evidence to turn to on this subject, and the effect of disbelieving petitioner's testimony was to leave the record silent on his willingness to participate in a narcotics transaction at the critical time of the Government's first approach to him. Kowel did not testify at the trial and there was no evidence except petitioner's testimony as to the relationship between them. Accordingly, whether the jury believed petitioner's testimony or not, the Government failed to make a *prima facie* case on the issue of petitioner's willingness to commit the offense in question without persuasion.

In the body of its argument, the Government seeks to excuse this failure of proof by suggesting that it was up to the defendant to bring in Kowel as a witness. The Government's brief states:

> "It is significant that petitioner made no attempt to call Kowel as a witness. * * * It was petitioner's duty * * * to produce * * * Kowel as a witness * * *" (Resp. Br. p. 18).

The Government thus contends that it was up to the defendant to produce a witness whose testimony was essential to cure a failure in the Government's proof, or, in short, that the defendant had the burden of proving the Government's case. It is hard to take such a contention seriously; it is answered in the stating.

CONCLUSION

The Judgment Below Should Be Reversed and the Case Remanded, With Instructions to Enter a Judgment of Acquittal.

Respectfully submitted,

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